In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1175

LUIGI LOBUE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the trial court erroneously denied his fourth motion for relief under 28 U.S.C. 2255.

After a jury trial on December 27, 1961, in the United States District Court for the Southern District of New York, petitioner was convicted of conspiring to violate the narcotics laws, in violation of former 21 U.S.C. 174. He was sentenced to a fifteen year term of imprisonment to run concurrently with a three year term imposed on February 29, 1960, after his plea of guilty to a charge of harboring aliens illegally within the United States, in violation of 8 U.S.C. 1324 and 18 U.S.C. 371. The court of appeals affirmed, *sub nom. United States* v. *Agueci*, 310 F. 2d 817 (C.A. 2), certiorari denied, *sub nom. Guippone* v. *United States*, 372 U.S. 959. Petitioner, who is currently subject to

deportation proceedings by the Immigration and Naturalization Service, was released on parole on May 28, 1970. Petitioner now seeks review of the court of appeals' affirmance (Pet. App. 1a-2a) of the district court's denial (Pet. App. 3a-8a) of petitioner's fourth collateral attack upon his narcotics conviction.

Petitioner's first 2255 motion alleged the denial of a fair trial because the trial court failed to read a portion of the testimony of a witness to the jurors during their deliberation. It was denied by Judge Weinfeld on September 27, 1967.

In his second collateral motion, filed on September 26, 1968, petitioner alleged that he was mentally incompetent prior to, during and after trial (Pet. App. 9a-13a). In a memorandum filed October 28, 1969, (Pet. App. 14a-18a), Judge Frankel stated that the motion papers seemed insufficient because there was "no indication * * * that either of the named psychiatrists or anyone else would be prepared to testify that the petitioner's mental illness beginning in late 1965 or any other facts ground possible inferences that he was incompetent in 1961, when he was tried" (Pet. App. 16a). Rather than denying the motion on this pleading deficiency at that time, Judge Frankel directed both petitioner and the government to submit in writing further detailed information as to whether petitioner desired counsel, what the expected testimony of the two named psychiatrists might be, and whether petitioner planned to testify if an evidentiary hearing were held (Pet. App. 16a-18a).

On November 28, 1969, the government, by supplementary affidavit, informed the trial court that medical records at the United States Medical Center in Springfield, Missouri, where petitioner was transferred on

May 25, 1966, stated that petitioner was diagnosed at that time as showing a schizophrenic reaction, paranoid type, suffering from psychotic episodes, delusions and occasional hallucinations. The affidavit also stated that the records revealed that after an initial six week period of erratic conduct, petitioner's behavior was considered unremarkable and that there was no indication in the records that petitioner was suffering from mental illness at any time prior to November 1965.

On December 1, 1969, Judge Frankel, having heard nothing from petitioner, wrote and directed him to " 'send a response or an explanation of why none is possible' " (Pet. App. 6a). Petitioner replied on December 8, 1969, stating that he did not "have anything to add to what I already have submitted to the Honorable Court," and asked Judge Frankel to withdraw his application (Pet. App. 19a-20a). On December 10, 1969, Judge Frankel, with an awareness of petitioner's medical history, filed an endorsement stating: "All things considered, it is concluded that [petitioner] should be permitted to [withdraw his petition]. Accordingly, upon the petitioner's application, his petition is dismissed" (Pet. App. 21a).

On June 8, 1970, petitioner with the aid of retained counsel filed the third collateral motion. His sole contention was that one of the government's witnesses had given perjured testimony during the 1961 trial. Although petitioner voluntarily completed a "Persons in Federal Custody Form" at that time which expressly informed him that all grounds for relief were to be stated thereon, he did not allege any issue of mental incompetence. On October 6, 1970, Judge Weinfeld filed an endorsement dismissing this petition as "utterly without merit" (Pet. App. 6a).

On February 9, 1972, petitioner with the aid of retained counsel filed the present motion (Pet. App. 22a-29a) alleging the identical grounds presented in his second motion, *i.e.*, that he was mentally incompetent prior to, during, and after trial. Petitioner's counsel supplemented this motion with records of the psychiatric treatment petitioner received during his commitment. As was the case with respect to petitioner's 1969 motion, no witness or evidence was offered to show that the petitioner was incompetent in 1961.[1]

In his decision filed March 20, 1972 (Pet. App. 3a-8a), Judge Wyatt recited the history of petitioner's collateral attacks upon his narcotics conviction including the failure of petitioner's retained counsel to raise this claim of mental incompetence in his third motion. He explained that this motion was assigned to him "apparently because the motion papers failed to disclose 'whether or not applications previously have been

[1]Petitioner's medical records, submitted as exhibits A-P, state that "he was first admitted to the psychiatric ward [at Lewisburg Prison] on November 18, 1965 manifesting depression and paranoid ideation. Just prior to this psychotic break, he had been examined and found to have duodenal ulcers and this may have precipitated his homosexual ideation * * *" (Ex. G, p. 1). After a brief recovery (Ex. O), petitioner experienced three overt psychotic breaks and his condition deteriorated (Ex. G, p. 1; Ex. M; Ex. N). He was therefore transferred to the Federal Medical Center at Springfield, Missouri, on May 25, 1966, where he remained until his parole in May 1970 (Ex. G, p. 2; Ex. K). His diagnosis at both the time of his admission and in May 1970 was "schizophrenic reaction, paranoid type, improved" (Ex. G, p. 3; Ex. B). The reports note that petitioner was maintained on minimal doses of medication and had adjusted well except "that Labue was quite paranoid and that in fact this paranoid behavior was part of a delusional system including a fear that people would know that he was a homosexual * * *" (Ex. H; Ex. I). We are lodging a copy of the exhibits with the Clerk of this Court.

made for writs or for similar relief, stating to what court or judge they were made, the determination in each case, and any new facts upon the present application that were not previously shown' in violation of the requirements of General Rule 26 (a) of this Court" (Pet. App. 7a). He also stated that this motion is the same as that decided by Judge Frankel in 1969, and that the substance of the information concerning petitioner's psychiatric treatment was provided in 1969 by the government's supplemental affidavit (Pet. App. 7a). Judge Wyatt then concluded, as did Judge Frankel in his memorandum of October 28, 1969, that petitioner is entitled to no relief because his application contains only bald legal conclusions with no supporting factual allegations. Judge Wyatt stated (Pet. App. 8a) that "* * * a review of the extensive files of the probation office and of the papers in this case and in the case before Judge Frankel discloses no suggestion that [petitioner] was incompetent in 1961 when he was tried. This motion is dismissed because it is the 'second or successive motion' for relief similar to that considered previously by this Court in 68 Civ. 3839 (28 U.S.C. 2255)."

Petitioner contends that Judge Wyatt's denial of the latest motion without a hearing was improper.

The record shows that neither the petitioner's second nor present motion presents any concrete evidence to support his claim of mental incompetence. Contrary to petitioner's claim (Pet. 16), even petitioner's medical records do not suggest that he hallucinated at his trial nor do they refer to any history of mental problems prior to November 1965.

While it may be that the merits of petitioner's assertion of mental incompetency were not reached by

Judge Frankel on the earlier motion, this would not mean that under *Sanders* v. *United States*, 373 U.S. 1, petitioner was automatically entitled to an evidentiary hearing on any subsequent unsubstantiated petition. Rather, as this Court noted in *Sanders, supra*, 373 U.S. at 19, a trial judge may repeatedly conclude that a motion is deficient where only bald legal conclusions without factual support have been alleged. After an examination of the application, files, and records of this case, Judge Wyatt properly found that petitioner's fourth collateral motion was insufficient as a matter of form—much as Judge Frankel had found petitioner's second motion. Only if petitioner were able to provide some shred of evidence, other than his bald assertion, that he was in fact mentally incompetent prior to or during his trial in 1961, would he be entitled to a hearing. Compare *Fontaine* v. *United States*, No. 71-6757, decided April 2, 1973.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. Griswold,
Solicitor General.

APRIL 1973.